

9/5/01

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT  
OF THE TTAB

Paper No. 15  
DEB

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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Kroeger Herb Products Co., Inc.  
v.  
Shaperite Concepts, Ltd.  
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Cancellation No. 28,369  
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David Mastbaum of Law Offices of David Mastbaum for Kroeger  
Herb Products Co., Inc.

Michael D. McCully of Halliburton Company for Shaperite  
Concepts, Ltd.  
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Before Hanak, Chapman and Bucher, Administrative Trademark  
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Kroeger Herb Products Co., Inc. (petitioner) has filed a  
petition to cancel Registration No. 2,139,757 owned by  
Shaperite Concepts, Ltd. (respondent) for the mark META-LEAN  
for "vitamins and nutritional dietary supplements" in  
International Class 5.<sup>1</sup>

As grounds for cancellation, petitioner alleges that  
since prior to respondent's first use petitioner has  
continuously used the mark METALINE for natural dietary

supplements; petitioner asserts priority and likelihood of confusion under Section 2(d) of the Trademark Act, contending that respondent's mark, when applied to respondent's goods, so resembles petitioner's previously used mark METALINE for dietary supplements as to be likely to cause confusion; that on February 28, 1997 petitioner filed an application for the mark METALINE for dietary supplements (Serial No. 75/249,358<sup>2</sup>), and that its application was refused registration under Section 2(d) of the Act on the basis of respondent's registration; and that respondent's registration has caused damage to petitioner.

Respondent, in its answer, denied the salient allegations of the petition to cancel.

The record consists of the pleadings; the file of the involved registration; the testimony, with exhibits, of Michelle Filoia and Thomas Brown; and a number of documents, including respondent's answers to interrogatories, all made of record by way of petitioner's notice of reliance. Respondent did not take any testimony or offer any evidence. Only petitioner filed a brief. An oral hearing was not requested by either party.

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<sup>1</sup> Registration No. 2,139,757 issued February 24, 1998, from an application filed on September 16, 1996. The claimed dates of first use and first use in commerce are September 18, 1996.

According to Thomas Brown, petitioner's president, petitioner manufactures and distributes dietary supplements. Petitioner has continuously used since 1978 the mark METALINE to identify a dietary supplement for metal detoxification. Between 1978 and 1997, the sale of METALINE products in forty-seven states produced \$390,000 in revenues for petitioner. The product is marketed to health food stores, pharmacies and licensed health practitioners, through petitioner's website, through distributors including multilevel marketers, and at trade shows.

We turn first to the question of priority of use. The testimony of Thomas Brown supports petitioner's continuous use of the METALINE mark since November 1978. In this case, respondent may rely on the filing date of its intent-to-use application, which became its constructive use date upon the issuance of its registration. That date, September 16, 1996, is clearly subsequent to petitioner's first use date of November 1978. Accordingly, in this dispute, priority belongs with petitioner.

This brings us to the issue of likelihood of confusion. Our determination is based upon an analysis of all of the probative facts in evidence that are relevant to the factors

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<sup>2</sup> Action on petitioner's application has been suspended by the Trademark Examining Attorney in Law Office 115 handling the application.

regarding likelihood of confusion. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

Turning first to the parties' goods, both are described as dietary supplements. Both are manufactured primarily with herbal substances. While respondent sells its supplement as a weight-loss product and petitioner touts its product as a cleansing formula designed for those concerned about metal poisoning, for purposes of our likelihood of confusion analysis, these two dietary supplements must be deemed to be closely related goods.

We turn next to the parties' respective marks. There are several obvious similarities between METALINE and META-LEAN. They have a similar appearance as each has the same number of letters, with the first five being identical. Each consists of three syllables. When spoken, any minor differences in sound between LINE and LEAN may go undetected since they are quite similar in terms of their pronunciation.

Inasmuch as the word METALINE appears in the dictionary as a mixture including metallic oxides,<sup>3</sup> one might argue this is in some way suggestive for a dietary supplement designed for metal detoxification, while as applied to a weight-loss product, the final syllable of META-LEAN creates a different,

suggestive connotation. However, in spite of these somewhat different suggestions, we find that the similarities in appearance and sound outweigh this slight difference in meaning. Accordingly, we conclude that these respective marks are quite similar in overall commercial impressions.

As to the du Pont factor dealing with channels of trade, neither party has restricted itself to any particular channels of trade. While there is no restriction in its identification of goods, the record shows that respondent relies primarily upon a multilevel marketing system. In any case, the record shows that petitioner also relies upon such distributors. Furthermore, both parties offer their products through catalogues and newsletters, and both maintain an active presence on the Internet. Again, while the record shows that respondent's procedural guidelines for its distributors would seem to prevent the appearance of respondent's goods on retail shelves, the record also demonstrates that this proscription is not enforced in a proactive manner.

Finally, as to the du Pont factor dealing with the conditions under which and buyers to whom sales are made, there is nothing in the record to suggest that dietary supplements are so expensive or that the purchasers are so

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<sup>3</sup> "Metaline, *n.* [*metal* and *-ine*] a lubricating mixture of metallic oxides, grease and other substances." Webster's Deluxe

sophisticated that our decision should be different because of this consideration.<sup>4</sup>

Accordingly, given that these are quite similar marks used on closely related goods moving through some of the same channels of trade to be purchased by the same class of ordinary purchasers, we find a likelihood of confusion.

Decision: The petition to cancel is granted, and Registration No. 2,139,757 will be cancelled in due course.

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Unabridged Dictionary, (2<sup>nd</sup> Ed.).

<sup>4</sup> While registrant did not file a brief or submit testimony during the trial portion of this case, respondent had argued in opposition to an earlier motion by petitioner for summary judgment that its customers were sophisticated when it came to health care products.